No. 14-185

In The
Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

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QUESTIONS PRESENTED

Whether, when a petition for review of a motion to reopen challenges the Board of Immigration Appeals' denial of equitable tolling, a court of appeals errs in dismissing for want of jurisdiction. More specifically:

1. Is the 90-day statutory deadline for filing a motion to reopen subject to equitable tolling?

2. If not, does a court of appeals err in construing an argument for equitable tolling as pertaining to the Board's exercise of its *sua sponte* authority to reopen?

3. Does a court of appeals have jurisdiction to review the Board's failure to exercise its *sua sponte* authority to reopen?

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

INTEREST OF *AMICUS CURIAE*

This brief is submitted by William R. Peterson, *amicus curiae* in support of the judgment below, by invitation of the Court. See 574 U.S. ___ (order of January 16, 2015).[1]

[1] *Amicus* affirms, under this Court's Rule 37.6, that no counsel for a party authored any part of this brief and that no person other than *amicus* and his co-counsel has made a monetary contribution to fund its preparation or submission.

INTRODUCTION

Two sources of authority permit the Board of Immigration Appeals (Board) to reopen removal proceedings. By statute, an alien has the right to file a single motion to reopen within 90 days of the date of entry of a final administrative order of removal. 8 U.S.C. 1229a(c)(7)(C)(i). By regulation, the Board has the discretion to reopen any case at any time on its own motion. 8 C.F.R. 1003.2(a).

The source of authority exercised by the Board determines the availability of judicial review. Courts generally have jurisdiction to review the Board's denial of a statutory motion to reopen. See *Kucana* v. *Holder*, 558 U.S. 233 (2010); Pet. Br. 14-16; U.S. Br. 16-28. *Amicus* and the government agree that courts lack jurisdiction to review the Board's refusal to exercise its regulatory discretion to reopen *sua sponte*. See *Heckler* v. *Chaney*, 470 U.S. 821 (1985); U.S. Br. 35 n.13. Jurisdiction over an alien's challenge to the denial of reopening thus depends on which authority it concerns.

Petitioner sought reopening after the 90-day deadline, arguing in his petition for review that the deadline should have been equitably tolled. In light of circuit precedent providing that the statutory deadline cannot be equitably tolled, the Fifth Circuit interpreted petitioner as arguing that the Board should have reopened *sua sponte* based on principles of equitable tolling. The Fifth Circuit dismissed the petition, in part, for want of jurisdiction.

Thus, although the ultimate question concerns whether the Fifth Circuit properly dismissed the petition for want of jurisdiction, the initial inquiry concerns whether the deadline is subject to equitable tolling, a question that has divided the lower courts and on which the parties have joined issue.

STATEMENT

A. Statutory and Regulatory Background

1. Proceedings under Section 1229a of Title 8 of the United States Code are "the sole and exclusive procedure for determining whether an alien may be admitted to the United States or * * * removed from the United States." 8 U.S.C. 1229a(a)(3).

Both the Department of Justice and Department of Homeland Security participate in these proceedings. Removal proceedings occur before immigration judges. 8 U.S.C. 1229a(b)(1). Aliens may appeal decisions of immigration judges to the Board, which reviews the factual findings for clear error and questions of law *de novo*. 8 C.F.R. 1003.1(d)(3); 8 C.F.R. 1003.3; 8 C.F.R. 1003.38. The Office of the Chief Immigration Judge and the Board are subdivisions of the Executive Office for Immigration Review within the Department of Justice. 8 C.F.R. 1003.0; 8 C.F.R. 1003.1; 8 C.F.R. 1003.10.

The immigration laws are enforced by lawyers from Immigration and Customs Enforcement, a

division of the Department of Homeland Security. See 8 U.S.C. 1103(a)(1); 8 C.F.R. 100.1.

An alien may be represented before the immigration judge and Board, but counsel will not be appointed. 8 U.S.C. 1229a(b)(4); 8 U.S.C. 1362; 8 C.F.R. 1003.16. Permissible representatives include attorneys, law students, accredited representatives, accredited officials, and subject to certain constraints, "reputable individual[s] of good moral character." 8 C.F.R. 1292.1(a).

Aliens subject to removal may apply for discretionary cancellation of removal and adjustment of status to lawful permanent resident. 8 U.S.C. 1229b(b)(1). Immigration judges act as the Attorney General's delegates in determining whether to grant this discretionary relief. 8 C.F.R. 1003.10(a). An alien seeking cancellation of removal must prove that the alien satisfies the eligibility requirements and merits a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4); 8 C.F.R. 1240.8(d). An alien who has been convicted of a crime involving moral turpitude is not eligible for cancellation of removal. 8 U.S.C. 1182(a)(2)(A)(i)(I); 8 U.S.C. 1227(a)(2)(A)(i)(I); 8 U.S.C. 1229b(b)(1).

Judicial review of a final order of removal is governed by Section 1252 of Title 8 of the United States Code. 8 U.S.C. 1252(b)(9). An alien may file a petition for review with the court of appeals "not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). The court of appeals will decide the

case based on the administrative record. 8 U.S.C. 1252(b)(4).

2. Two sources of authority permit removal proceedings to be reopened. First, for more than fifty years, the Board's regulations have provided it with authority to reopen or reconsider cases on its own motion. See 27 Fed. Reg. 96 (Jan. 5, 1962) (now codified at 8 C.F.R. 1003.2).

Second, an alien may file a statutory motion to reopen. Congress first addressed reopening in the Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 4978, 5063 (1990). In an effort "to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions," Congress "directed the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file" and "regulations specifying the maximum time period for the filing of those motions." *Stone* v. *INS*, 514 U.S. 386, 400 (1995). Congress suggested a single motion filed within 20 days of the final determination. *Ibid.*

A proposed rule first issued in 1994. Consistent with the suggestions in the Conference Report, the proposed rule allowed for only one motion to reopen and required that the motion be filed within 20 days. 59 Fed. Reg. 29,386, 29,388 (proposed June 7, 1994).

In 1995, the proposed rule was revised in response to comments expressing concern that "unrepresented aliens and, in particular, detained aliens

would not have access to counsel in time to develop a meaningful motion to reopen within the 20-day period." 60 Fed. Reg. 24,573, 24,574 (proposed May 9, 1995). Based on these concerns, the agency agreed that a greater time period – 90 days – should be allowed for filing motions to reopen. *Ibid.* Nonetheless, even the revised rule would "dramatically limit this form of relief" by restricting aliens to a single motion to reopen and because "such opportunity for reopening will be limited to a 90-day time period." *Ibid.* These limits "reflect the congressional intent to streamline the deportation process, while providing a reasonable opportunity for meritorious cases to be heard." *Ibid.*

In issuing a final rule in April 1996, the Department of Justice adhered to the 90-day deadline and responded to comments that "requested that a 'good cause' exception to the time and number limitations be added to the new provisions concerning motions to reopen." 61 Fed. Reg. 18,900, 18,901-18,902 (April 29, 1996). The Department of Justice rejected the suggested "good cause" exception: "The Department does not agree with the commenters' suggestions that a 'good cause exception' would be an appropriate procedural mechanism for addressing exceptional cases that fall beyond this rule's time and number limitations." *Ibid.* Instead, the Board's authority to reopen *sua sponte* "provides a procedural vehicle for the consideration of cases with exceptional circumstances." *Ibid.*

Congress later passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Section 304 establishes a statutory 90-day deadline to file a single motion to reopen, subject to certain exceptions. *Id.* § 304 (codified as amended at 8 U.S.C. 1229a(c)(7)). This statute "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief." *Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008).

B. Facts and Procedural History

1. Petitioner Noel Reyes Mata, who was born in Mexico, entered the United States without being admitted. A.R. 214-215. Petitioner was arrested in August 2010 for assaulting his wife, A.R. 535, 541, and pleaded guilty in September. A.R. 526. The judgment notes that petitioner was convicted of an offense that involves family violence. A.R. 526.

After this conviction, DHS issued a Notice to Appear – the document that initiates removal proceedings – charging petitioner with being subject to removal as an alien present in the United States without being admitted or paroled. A.R. 562-563. See also 8 U.S.C. 1229a(e)(2)(A); 8 U.S.C. 1182(a)(6)(A)(i).

Petitioner's first individual hearing before an immigration judge occurred in January 2011. Petitioner's counsel conceded that petitioner was removable but explained that he would request cancellation of

removal. A.R. 196-197. Counsel filed a lengthy application in May. A.R. 212-519.

At an August hearing on this application, the government provided records of petitioner's conviction. See J.A. 15 (admitting A.R. 520-568). The immigration judge concluded that this conviction rendered petitioner ineligible for cancellation of removal. J.A. 19; J.A. 6-13.

2. Petitioner's counsel filed a timely notice of appeal to the Board. A.R. 173-176. The notice indicated an intent to file a separate written brief. A.R. 174. No brief was filed.

DHS sought summary affirmance with a two-page motion, arguing that the immigration judge "correctly determined that the respondent was statutorily ineligible for cancellation of removal." A.R. 143.

On September 21, 2012, the appeal was summarily dismissed by a single Board member. J.A. 4-5. See also 8 C.F.R 1003.1(d)(2) (discussing summary dismissals). The decision noted that the notice of appeal did not identify specific challenges to the immigration judge's decision and that petitioner did not file a brief. J.A. 4-5. The 90-day deadline for filing a motion to reopen began to run at this point. 8 U.S.C. 1229a(c)(7)(C)(i).

Notice of this decision was sent directly to petitioner. A.R. 138. Since 2009, the Board has provided a copy of its final decision to all aliens in proceedings, "regardless of whether the alien is represented by

counsel." See News Release, Executive Office for Immigration Review, Board to Begin Providing Copy of Decision to Aliens Who Are Represented by Counsel (Dec. 19, 2008), *available at* http://www.justice.gov/eoir/press/08/BIAProvidesCourtesyCopy121908.pdf.

By October 10, just 19 days after the decision, petitioner had retained new counsel who was "in the process of filing a Motion to Reopen Mr. Reyes Mata's case." A.R. 122-123.

3. Petitioner filed a motion to reopen on January 14, 2013, 115 days after the Board's final decision. A.R. 88. The motion does not acknowledge that it is untimely, A.R. 88-95, and the record does not indicate why the motion was filed out of time.

DHS opposed reopening for several reasons, including that the motion "was filed more than 90 days after the Board's September 21, 2012 decision." A.R. 77-78.

Petitioner's response requested that the time bar be excused because of "exceptional circumstances." A.R. 69. Petitioner did not expressly request either equitable tolling or the Board's exercise of its *sua sponte* authority to reopen. He simply asserted that "[t]he motion is not time barred if the court finds exceptional circumstances." *Ibid.*

The motion to reopen was denied by a single member of the Board. Pet. App. 6-9. Although one sentence mentions tolling in passing, the decision ultimately concludes that the motion "does not

demonstrate an exceptional situation that would warrant reopening as an exercise of discretion." Pet. App. 9. "Accordingly, the untimely motion will be denied." Pet. App. 9.

4. Petitioner then filed a petition for review with the Fifth Circuit. J.A. 1; 8 U.S.C. 1252(b)(2). In his briefing, petitioner asked the Fifth Circuit to "re-examine its holding in *Ramos-Bonilla v. Mukasey* that motions to reopen before the Board of Immigration Appeals are not subject to equitable tolling." Pet. C.A. Reply Br. 8 (internal citation omitted). Petitioner also argued that the Board's exercise of its *sua sponte* authority to reopen "is subject to judicial review." Pet. C.A. Br. 7-8.

A Fifth Circuit panel consisting of Judges Barksdale, Haynes, and Higginson denied relief in an unpublished per curiam opinion. Pet. App. 1-3.

The Fifth Circuit holds that "equitable tolling is not a basis for filing an untimely or numerically-barred motion [to reopen] under the statute or regulations." *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam). As a result, an argument for equitable tolling "is in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling." *Ibid.* See also *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (citing *Lin* for this proposition).

Following *Ramos-Bonilla*, the panel construed petitioner's argument for equitable tolling as an argument

that the Board should have exercised its discretion to reopen *sua sponte*. Pet. App. 2. Consistent with other circuits, the panel held that it lacked jurisdiction to review the Board's exercise of its discretion not to reopen on its own motion because it had "no meaningful standard against which to judge that exercise of discretion." Pet. App. 2-3. Accordingly, the panel dismissed the petition in part and denied the petition in part. Pet. App. 3.

SUMMARY OF ARGUMENT

The judgment of the Fifth Circuit should be affirmed.

1. The statutory deadline for filing motions to reopen is not subject to equitable tolling. The text contains no tolling provision. Section 1229a(c)(7)(C)(i) requires that a motion to reopen before the Board be filed within 90 days, and the exceptions to this deadline do not include equitable tolling.

Background principles do not counsel in favor of implying an equitable-tolling exception to the statutory deadline. Petitioner's assertion that all non-jurisdictional deadlines are presumptively subject to equitable tolling is incorrect. Rather, background principles suggest that *statutes of limitations* are presumptively subject to equitable tolling. *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014). But the deadline for filing a motion to reopen is not a statute of limitations, and therefore this presumption is inapposite.

The government agrees with *amicus* that petitioner and the courts of appeals err in invoking this presumption, U.S. Br. 37, but nonetheless reaches the same result on different grounds. The government argues that deference to the Board supports the availability of equitable tolling, but this argument fails for two reasons. First, the statute is unambiguous, and therefore its plain language leaves no room for deference. Second, the Board's decisions should not receive *Chevron* deference because they are non-precedential and have not interpreted the statute; in applying equitable tolling, the Board has merely followed decisions of the circuit courts. No deference is due to the Board's position.

Nor do policy grounds support an interpretation of the statute that includes equitable tolling. In setting any deadline, Congress must balance the interest in accuracy against the need for finality. The 90-day deadline should be enforced as written.

No source indicates that Congress intended for this text to mean anything other than what it says: "Except as provided" by express textual exceptions, motions to reopen "shall be filed within 90 days." 8 U.S.C. 1229a(c)(7)(C)(i). The Fifth Circuit correctly holds that equitable tolling is unavailable.

2. Because equitable tolling is unavailable, the Fifth Circuit committed no error in construing petitioner's tolling argument as pertaining to the Board's exercise of its *sua sponte* authority to reopen. When a statutory motion to reopen is time-barred, the only

possibility for relief is for the Board to reopen on its own motion. By construing petitioner's tolling argument as it did, the Fifth Circuit did not prejudice petitioner; to the contrary, this construction gave petitioner the benefit of an additional opportunity to obtain relief. Even if not required to do so, appellate courts (and the Board) act within their authority and commit no error by focusing on a filing's substance instead of its form.

3. The courts of appeals lack jurisdiction over challenges to the Board's failure to reopen on its own motion. The government and courts of appeals agree that jurisdiction is absent because courts lack any "meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). See U.S. Br. 35 n.13. Neither the regulations nor the Board's decisions provide such a standard.

The Fifth Circuit thus correctly: (1) determined that petitioner's arguments that equitable tolling excused the untimeliness of his motion to reopen could not provide him with relief; (2) construed his arguments as challenging the Board's failure to reopen on its own motion, the only possibility for reopening after expiration of the statutory deadline; and (3) held that it lacked jurisdiction to review the Board's failure to exercise its *sua sponte* authority. The judgment below should be affirmed.

ARGUMENT

I. THE DEADLINE FOR FILING MOTIONS TO REOPEN IS NOT SUBJECT TO EQUITABLE TOLLING.

Logically, the first issue is whether the deadline is subject to equitable tolling.[2] The Fifth Circuit is correct that this deadline is not subject to equitable tolling. The text sets an inflexible 90-day deadline, and there is no reason to believe that Congress meant to include an implied exception for equitable tolling.

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[2] The government is incorrect that whether equitable tolling is available is "not before this Court and should not be addressed at this time." U.S. Br. 14.

The question presented fairly includes the subsidiary question of equitable tolling's availability. See Sup. Ct. R. 14.1(a). The premise of the Fifth Circuit's construal rule is that the statutory deadline cannot be equitably tolled. See *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) ("Because equitable tolling is not a basis for filing an untimely or numerically-barred motion * * *.").

The petition confirms that the scope of the question presented includes the availability of equitable tolling: "Petitioner asks that the Court rule with finality that 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2) are non-jurisdictional claim-processing rules and hence are subject to equitable tolling without an implied request for the BIA to exercise its *sua sponte* power." Pet. 26-27.

Moreover, any assertion that this issue is not properly before the Court should have been made before certiorari was granted. See Sup. Ct. R. 15.2.

A. The statute's plain text does not permit equitable tolling.

"[W]hether equitable tolling is available is fundamentally a question of statutory intent." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014). This statute establishes a firm deadline, which does not provide for tolling: "Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). The regulations repeat this deadline in nearly identical language that is, if anything, more definite. See 8 C.F.R. 1003.2(c)(2) ("must be filed no later than 90 days").

Equitable tolling is inconsistent with this plain text. Congress expressly provided that a motion to reopen shall be filed within 90 days, and petitioner filed his after 115 days. Equitable tolling would "effectively exten[d] an otherwise discrete [deadline] set by Congress." *Lozano*, 134 S. Ct. at 1232.

The express exceptions "provided in this subparagraph" indicate that Congress considered the circumstances in which equity would require a longer deadline and did not include equitable tolling among those exceptions. Congress eliminated the deadline for a motion to reopen filed by an alien seeking asylum if the motion is based on changed country conditions. 8 U.S.C. 1229a(c)(7)(C)(ii). And it included more generous deadlines for motions filed by battered spouses, children, and parents. 8 U.S.C. 1229a(c)(7)(C)(iv). See also 8 U.S.C. 1229a(c)(7)(C)(iv)(III) (permitting

the Attorney General to waive this time limitation "in the case of an alien who demonstrates extraordinary circumstances"). Similarly, Congress provided that aliens who failed to appear at their removal hearing may file a motion to reopen within 180 days. 8 U.S.C. 1229a(c)(7)(C)(iii); 8 U.S.C. 1229a(b)(5)(C)(i). If the alien who failed to appear did not receive proper notice or was held in federal or state custody, he or she may file a motion to reopen at any time. 8 U.S.C. 1229a(b)(5)(C)(ii).

Moreover, when Congress intended other immigration deadlines to include exceptions for good cause or extraordinary circumstances, it wrote exceptions expressly. For example, Congress provided that courts may extend the deadline for filing briefs "upon motion for good cause shown." 8 U.S.C. 1252(b)(3)(C). Similarly, Congress provided that "extraordinary circumstances" may excuse an untimely application for asylum. 8 U.S.C. 1158(a)(2)(D). This Court should heed Congress's choice not to include a similar exception to 8 U.S.C. 1229a(c)(7)(C)(i).

Both the statute and regulations set a firm deadline. Absent some indication that Congress intended for the deadline to include an implicit equitable tolling exception, the statute should be enforced as written.[3]

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[3] To the extent that the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is material, it is consistent with not permitting equitable tolling

(Continued on following page)

B. Background principles of law do not create an implied equitable tolling exception to the deadline for filing a motion to reopen.

The deadline for filing a motion to reopen is not jurisdictional,[4] but petitioner overstates that conclusion's consequence. See Pet. Br. 18 ("[N]onjurisdictional rules are subject to a rebuttable presumption in favor of equitable tolling.") (emphasis and internal quotation marks omitted). The presumption that *statutes of limitations* are subject to equitable tolling (sometimes called the *Irwin* presumption) applies only to statutes of limitations. *Lozano*, 134 S. Ct. at 1234. See also *Irwin* v. *Dep't of Veterans Affairs*, 498

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by indicating Congress's concern with finality. Representative Roukema explained that the bill "streamlines and expedites procedures for deporting and excluding illegal aliens." 142 Cong Rec. H2388 (daily ed. Mar. 19, 1996) (statement of Rep. Roukema). "Persons making legitimate claims of asylum must get one hearing and one appeal – no more endless delays, appeals, and readjudication of immigration cases." *Ibid.*

Senator Abraham criticized the manipulation of the immigration laws by criminal aliens "requesting endless review of their orders of deportation" and "abusing unduly generous provisions of judicial and administrative review." 142 Cong. Rec. S4599 (daily ed. May 2, 1996) (statement of Sen. Abraham). He explained that the reforms contained in the legislation "will go still further in that direction [of stopping this manipulation]" than earlier legislation. *Ibid.*

[4] The deadline is instead a "claim-processing" rule that required petitioner to "take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011). See also *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (a "quintessential claim-processing rul[e]").

U.S. 89 (1990). The presumption has no application to deadlines that are not statutes of limitations, such as the deadline for filing a motion to reopen.

1. The presumption of equitable tolling applies only to statutes of limitations.

The significance of a rule being "jurisdictional" is well established. Jurisdictional rules "alte[r] the normal operation of our adversarial system" by imposing an independent obligation on courts to consider jurisdiction at any time. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011). They therefore "can never be forfeited or waived." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States* v. *Cotton*, 535 U.S. 625, 630 (2002)). Courts may not "create equitable exceptions to jurisdictional requirements." *Bowles* v. *Russell*, 551 U.S. 205, 214 (2007).

In contrast, non-jurisdictional rules may or may not be subject to equitable tolling. See Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1 (2008). Claims-processing rules may be "mandatory" without being jurisdictional. *Henderson*, 131 S. Ct. at 1203. They may set "inflexible" and "unalterable" deadlines. *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004). "[A] time limitation may be emphatic, yet not jurisdictional." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (describing *Kontrick* in a parenthetical). See also *Carlisle* v. *United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even

rigid ones, under the heading 'subject matter jurisdiction.'").

A presumption of equitable tolling applies only to a subset of claims-processing rules: statutes of limitations. *Lozano*, 134 S. Ct. at 1234. See also *Young* v. *United States*, 535 U.S. 43, 49-50 (2002) ("Congress must be presumed to draft limitations periods in light of this background principle [that limitations periods are customarily subject to equitable tolling]."); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) ("[The *Irwin*] presumption seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of instances where it enacted a Government-related statute of limitations."); *Holland* v. *Florida*, 560 U.S. 631, 645-646 (2010) ("[A] nonjurisdictional federal statute of limitations is normally subject to a rebuttable presumption in *favor* of equitable tolling.") (internal citations and quotation marks omitted). Equitable tolling "applies when there is a statute of limitations" and is "a rule of interpretation tied to that limit." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 (2014).

The source of this presumption is the principle that Congress "legislate[s] against a background of common-law adjudicatory principles," which may create atextual exceptions to statutory text. *Lozano*, 134 S. Ct. at 1232 (quoting *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U.S. 104, 108 (1991) (alteration in original)). For example, common-law immunity

doctrines were incorporated into Section 1983 "notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities." *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980). Some principles are so firmly established that this Court "presume[s] that Congress would have specifically so provided had it wished" for them not to apply. *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967).

There is no background adjudicatory principle that deadlines are generally subject to equitable tolling, and this Court has repeatedly refused to extend this presumption beyond statutes of limitations. See, *e.g.*, *Lozano*, 134 S. Ct. at 1234 ("[W]e have only applied that presumption to statutes of limitations."); *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827 ("*Irwin* itself, and equitable-tolling cases we have considered both pre- and post-*Irwin*, have generally involved time limits for filing suit in federal court. * * * We have never applied the *Irwin* presumption [of equitable tolling] to an agency's internal appeal deadline[.]"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (distinguishing a pre-suit notice requirement from a statute of limitations in holding that it is not subject to equitable tolling). Such an extension of the rule – "assum[ing] an implied exception for tolling virtually every time a number appears" in federal statutes – would "work a kind of linguistic havoc." *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997).

The presumption of equitable tolling applies only if the deadline for filing a motion to reopen is a statute of limitations. It is not.

2. The deadline for filing a motion to reopen is not a statute of limitations.

Formally, a statute of limitations "creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014) (quoting Black's Law Dictionary 1546 (9th ed. 2009)). Less formally, the phrase "can refer to any provision restricting the time in which a plaintiff must bring suit." *Id.* at 2185. See also *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013) ("Statutes of limitations establish the period of time within which a claimant must bring an action.").

Under this definition, the deadline for filing a motion to reopen is not a statute of limitations. It does not govern when suit must be initiated, a claim filed, or an action brought. It merely prescribes the period for taking one of the many steps that may occur during the course of litigation, requiring an alien to "take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

A motion to reopen resembles other post-judgment motions that do not initiate a new proceeding and are not subject to "statutes of limitations." This Court has compared a motion to reopen to "a

motion for a new trial in a criminal case on the basis of newly discovered evidence," *INS* v. *Abudu*, 485 U.S. 94, 110 (1988), and a motion for reconsideration to a Rule 60(b) motion. *Stone* v. *INS*, 514 U.S. 386, 401 (1995). "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Henderson*, 131 S. Ct. at 1202. These rules are not all statutes of limitations and are not all presumptively subject to equitable tolling.

The distinction between statutes of limitations and other deadlines has deep roots. In 1931, this Court addressed whether the deadline to seek a writ of execution was a statute of limitations. *Custer* v. *McCutcheon*, 283 U.S. 514, 516 (1931). The Court held that the principle that statutes of limitations do not apply to the sovereign did not apply to the deadline for seeking a writ of execution because "[t]he time limited for issuing executions is, strictly speaking, not a statute of limitations." *Id.* at 519. "On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in the course of a litigation after it is instituted." *Ibid.*

Similarly, in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956), this Court held that a statute of limitations did not bar the defense of the doctrine of primary jurisdiction. *Id.* at 74. The purpose of statutes of limitations is "to keep stale litigation out of the courts." *Id.* at 72. It had no further application because "the action was already in court

and held to have been brought in time." *Ibid.* Statutes of limitations "are aimed at lawsuits, not at the consideration of particular issues in lawsuits." *Ibid.*

This is not the only circumstance in which statutes of limitations are treated differently than other rules of court procedure. "For purposes of *Erie R. Co. v. Tompkins,* for example, statutes of limitations are treated as substantive." *Jinks* v. *Richland County*, 538 U.S. 456, 465 (2003) (internal citation omitted).

Filing a motion to reopen is merely a procedural step in the course of litigation that has already been instituted. The presumption applicable to statutes of limitation does not establish that Congress intended the deadline in Section 1229a(c)(7)(C)(i) to be subject to an implied exception for equitable tolling.

In addition, as the government notes, the administrative context provides another reason that the presumption of equitable tolling should not apply. See U.S. Br. 37; *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013) (noting that the Court has "never applied the *Irwin* presumption to an agency's internal appeal deadline"); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525 (1978) (describing background law as "cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies").

C. Board decisions do not provide a basis for equitable tolling.

Abandoning the reasoning of the courts of appeals, the government argues that equitable tolling should be available because of deference to the Board. U.S. Br. 37. However, the Board's decisions do not provide a basis for concluding that the statutory deadline is subject to equitable tolling.

1. No deference is proper because the statute is not ambiguous.

a. Section 1229a(c)(7)(C)(i) unambiguously establishes a firm deadline for filing a motion to reopen. When a statute is unambiguous, there is nothing for an agency to construe. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).[5] A presumption that Congress, in writing an unambiguous procedural statute, still intended to permit an agency to "design its own procedural rules," U.S. Br. 39, in contravention of the

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[5] The language of the regulations essentially mirrors the language of the statute. Compare 8 U.S.C. 1229a(c)(7)(C)(i) ("shall be filed within 90 days of the date of entry of a final administrative order") with 8 C.F.R. 1003.2(c)(2) ("must be filed no later than 90 days after the date on which the final administrative decision was rendered"). The correct inquiry is thus whether the agency is entitled to *Chevron* deference: "[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006).

statute would be an unwarranted extension of administrative deference.

There is no ambiguity in the phrase "shall be filed within 90 days." 8 U.S.C. 1229a(c)(7)(C)(i). Nor does the government assert that the statute is ambiguous. U.S. Br. 37-39. Under ordinary administrative principles, there is no room for deference.

b. *Vermont Yankee* does not support the government's argument. The case holds that courts may not impose additional procedures on agencies beyond those found in the Administrative Procedure Act. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). This decision does not discuss the ability of agencies to create exceptions to statutory procedural rules.

To the contrary, *Vermont Yankee* reaffirms that courts "must determine whether the agency complied with the procedures mandated by the relevant statutes." *Id.* at 549 n.21 (citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 417 (1971)). It creates no presumption that agencies may create exceptions to unambiguous statutory mandates.

The regulatory extension of a deadline in *Sebelius* v. *Auburn Regional Medical Center*, 133 S. Ct. 817 (2013), does not establish the Board's ability to extend Section 1229a(c)(7)(C)(i). In *Auburn Regional*, this Court held that a non-jurisdictional time prescription "d[id] not bar the modest extension contained in the Secretary's regulation." *Id.* at 826. The decision rejected an argument that the deadline was jurisdictional. *Id.* at 824-825. See *id.* at 823 n.4 (noting

the appointment of an *amicus* to argue that "the statutory 180-day time limit is jurisdictional"). The opinion does not discuss ambiguity.

There are three distinctions between this statute and the statute at issue in *Auburn Regional*. First, in this statute, Congress included express statutory exceptions, indicating that Congress considered when exceptions should be made to the deadline. Compare 8 U.S.C. 1229a(C)(7)(c)(i) ("Except as provided in this subparagraph * * * ") with *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827 (noting a "180-day deadline, with no statutory exceptions").

Second, there is no longstanding administrative interpretation of this statute. See pp. 27-32, *infra* (arguing that the Board has not interpreted the statute). In contrast, in *Auburn Regional*, Congress had amended the statute six times without expressing disapproval of the regulations permitting extension of the statutory deadline. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828.

Third, the history of this statute negates any suggestion that Congress meant to leave this deadline in the hands of the agency. In 1990, Congress directed the Attorney General to place regulatory limits on motions to reopen. But in 1996, Congress superseded these regulatory time and number limits with statutory ones, "transform[ing] the motion to reopen from a regulatory procedure to a statutory form of relief." *Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008). Far from embracing the idea that the Board "should be free to fashion [its] own rules of procedure," U.S. Br. 38

(quoting *Vermont Yankee*, 435 U.S. at 544), Congress chose to impose limits by statute.

c. Nor does the Board's "retained authority and broad discretion to reopen proceedings on its own motion," U.S. Br. 40, indicate similar authority to toll the statutory deadline imposed by Congress. Elsewhere in its brief, the government correctly emphasizes that statutory motions to reopen and the Board's *sua sponte* authority are "logically and doctrinally distinct." U.S. Br. 31.

Amicus agrees with the government that the Board may "exercis[e] discretion to apply equitable tolling principles to, and to consider the merits of, an otherwise untimely motion to reopen filed by an alien." U.S. Br. 40. But the Board may do so only through the exercise of its *sua sponte* authority, not by extending the statutory deadline set by Congress. See pp. 35-40, *infra*.

2. The Board has not interpreted the statute to permit equitable tolling.

Even if the government were correct that the Board could interpret the statute to include equitable tolling, the Board has not done so. Deference is therefore not warranted.

a. No precedential Board decision interprets this statute to allow for equitable tolling. The government relies only on non-precedential decisions. See U.S. Br. 24.

As an initial matter, these non-precedential decisions do not receive *Chevron* deference because they do not "bind more than the parties to the ruling." *United States* v. *Mead Corp.*, 533 U.S. 218, 232 (2001). Lower courts have refused to give deference to these decisions. See, *e.g.*, *Mahn* v. *Attorney Gen.*, 767 F.3d 170, 173 (3d Cir. 2014); *Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 909 (9th Cir. 2009).

Moreover, the Board has not applied equitable tolling based on its own interpretation of the statute or regulation; it has merely followed circuit precedent. "With rare exceptions, the [Board] follows the law of the circuit in which an individual case arises." *Jama* v. *ICE*, 543 U.S. 335, 350 n.10 (2005). See also *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("[W]e have historically followed a court's precedent in cases arising in that circuit."); *Matter of K-S-*, 20 I. & N. Dec. 715, 718 (B.I.A. 1993) ("[W]e have held that published case law from a United States court of appeals must be followed within the same circuit, except in unusual circumstances[.]").

Research has identified no Board decision discussing equitable tolling that interprets the statutory text or the regulations. The decisions cited by the government are not the product of reasoned interpretation of an agency applying its specialized expertise; they are the product of an agency faithfully deferring to circuit authority.

When the Board considers equitable tolling, it frequently explains, expressly, that it is following

governing circuit authority: "The United States Court of Appeals for the Sixth Circuit, the jurisdiction wherein this case arises, has held that equitable tolling can apply to the time limits on motions to reopen based on ineffective assistance of counsel." *In re Khurram Jehangir Khan*, No. A78442144, 2007 WL 2074553, at *1 (B.I.A. June 15, 2007) (non-precedential).[6]

Similarly, Board decisions within the Fifth Circuit ordinarily note that governing circuit authority rejects equitable tolling: "The Immigration Judge correctly determined that the Fifth Circuit has not adopted the doctrine of equitable tolling in this context." *In re Sergio Ibarra-Amaya*, No. A041776122,

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[6] See, *e.g.*, *In re Julio Alexander Guzman-Vasquez*, No. A044 002033, 2014 WL 1118477, at *1 (B.I.A. Feb. 18, 2014) (non-precedential) ("In cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the 90-day filing deadline for motions to reopen is subject to equitable tolling[.]"); *In re Uriah Small*, No. A076565011, 2013 WL 4041234, at *2 (B.I.A. July 30, 2013) (non-precedential) ("The United States Court of Appeals for the Second Circuit has determined that the deadline for motions to reopen deportation proceedings may be equitably tolled to accommodate claims of ineffective assistance of counsel."); *In re Segundo Antonio Rodriguez Rodriguez*, No. A37922683, 2007 WL 2074548, at *1 (B.I.A. June 15, 2007) (non-precedential) ("The United States Court of Appeals for the Third Circuit, the jurisdiction wherein this case arises, has held that aliens raising an ineffective assistance claim in a motion can have the time limits on motions equitably tolled.").

2013 WL 2608334, at *3 (B.I.A. May 28, 2013) (non-precedential).[7]

The decision quoted by the government for the proposition that the Board "generally accepts" equitable tolling is an outlier, in conflict with the decisions cited in the footnotes above. See U.S. Br. 24 (quoting *In re Diaz*, No. A074081757, 2009 WL 2981747, at *2 (B.I.A. Aug. 21, 2009) (non-precedential)). Significantly, the authority relied upon by *Diaz* says nothing about tolling; the word "toll" is not even found in the decision. See *Matter of Compean*, 25 I. & N. Dec. 1 (U.S. Atty. Gen. 2009).

When the Board chooses to reject circuit authority in favor of its own interpretation, it is unmistakable. For example, "We disagree with the reasoning of the

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[7] See also *In re Armando Moreno*, No. A023555408, 2014 WL 3795516, at *2 (B.I.A. June 17, 2014) (non-precedential) ("But under the binding precedent of the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this case arises, an argument for equitable tolling of the time limitation on motions to reopen is construed as a challenge to our refusal to reopen the proceedings at any time pursuant to our regulatory *sua sponte* authority under 8 C.F.R. § 1003.2(a). To the extent that the respondent seeks to have us apply equitable tolling cases from outside of the Fifth Circuit, we decline to do so." (internal citation omitted)); *In re Marbel Balmore Moreno*, No. A097310769, 2012 WL 3911861, at *1 (B.I.A. Aug. 28, 2012) (non-precedential) (following *Ramos-Bonilla*, construing a motion for equitable tolling as a motion to reopen *sua sponte*; and denying *sua sponte* reopening); *In re Fernando Manuel Herrera De Avila*, No. A096095631, 2011 WL 7071006, at *1 (B.I.A. Dec. 27, 2011) (non-precedential) ("A request for equitable tolling in this context is in essence a request for *sua sponte* reopening.").

[9th Circuit] majority in *Cuevas-Gaspar v. Gonzales*, *supra*, and concur instead with the dissenting opinion in that case." *In re Escobar*, 24 I. & N. Dec. 231, 233 (B.I.A. 2007). Such a decision – which "expressed the BIA's view, based on its experience implementing the INA, that statutory text, administrative practice, and regulatory policy" lead to the same result – received *Chevron* deference. *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2021 (2012).

With respect to equitable tolling, however, because the Board has not engaged in "construction of a statutory scheme," no *Chevron* deference is due its decisions. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). It has not promulgated an interpretation in the exercise of its authority to make rules carrying the force of law. See *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). Cases applying equitable tolling do not reflect the Board's judgment at all, much less its "fair and considered judgment." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 n.4 (2015) (quoting *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)).

b. The document that reflects the Board's position regarding the availability of equitable tolling is the response to comments in promulgating the regulatory deadline. Some comments suggested that the agency adopt a "good cause" exception to the number and time limits for motions to reopen. The agency expressly rejected that suggestion:

> The Department does not agree with the commenters' suggestions that a "good cause exception" would be an appropriate procedural mechanism for addressing exceptional cases that fall beyond this rule's time and number limitations. Instead, section 3.2(a) of the rule provides a mechanism that allows the Board to reopen or reconsider sua sponte and provides a procedural vehicle for the consideration of cases with exceptional circumstances.

61 Fed. Reg. 18,900, 18,901-18,902 (April 29, 1996).

Although an agency may change its interpretation, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Ibid.* The Board has never acknowledged nor displayed any awareness that it was changing from this interpretation.

Even if the government were correct that the Board could interpret this deadline as subject to equitable tolling, it has not done so. Deference to the Board is no reason to conclude that this statute is subject to equitable tolling.

D. In establishing a firm deadline, Congress struck a balance between accuracy and finality.

This Court has rejected policy considerations as a basis for interpreting a deadline as subject to equitable tolling: "We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose. To the contrary, we may apply equitable tolling * * * only if we determine that the * * * drafters so intended." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014). That should be the end of the matter.

By their nature, deadlines may produce unfair outcomes. Deadlines "necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them." *United States* v. *Locke*, 471 U.S. 84, 101 (1985).

But "[r]ules of procedure are a necessary part of an orderly system of justice." *Houston* v. *Lack*, 487 U.S. 266, 283 (1988) (Scalia, J., dissenting) (quoting *Thompson* v. *INS*, 375 U.S. 384, 390 (1964) (Clark, J., dissenting)). "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 644 (1992). A legal system must, at some point in time, demand finality in judgments and administrative decisions.

The interest in finality is confirmed by the treatment of post-judgment motions in ordinary civil and

criminal litigation. When the statutory deadline was enacted in 1996, the rules of civil and criminal procedure forbade courts to extend the deadlines for post-judgment motions. Although courts could generally enlarge deadlines, the rules provided that a court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a)." Fed. R. Civ. P. 6(b) (1994 ed.). See also Fed. R. Crim. P. 45(b) (1994 ed.) ("may not extend the time for taking any action under Rules 29, 33, 34 and 35"). Rule 45(b) made an "insistent demand for a definite end to proceedings." *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam).

The same is true here. By restricting an alien to filing a motion to reopen within 90 days, Congress demanded a definite end to immigration proceedings. In setting this deadline, like other deadlines, Congress struck a balance between relief and repose. The fairness of this legislative judgment should not be reconsidered by this Court. The inflexible 90-day deadline is not subject to equitable tolling.[8]

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[8] Holding that the 90-day deadline is not subject to equitable tolling does not foreclose application of rules of forfeiture or waiver. See Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 4 (2008). Indeed, the regulations expressly permit DHS to waive the deadline by joining in a motion to reopen. 8 C.F.R 1003.2(c)(3)(iii).

II. BECAUSE EQUITABLE TOLLING IS UNAVAILABLE, AN ARGUMENT FOR EQUITABLE TOLLING IS PROPERLY CONSTRUED AS AN ARGUMENT THAT THE BOARD SHOULD HAVE REOPENED *SUA SPONTE*.

After the expiration of the statutory deadline, a statutory motion to reopen cannot succeed. A time-barred motion to reopen can provide relief only as an invitation for the Board to reopen *sua sponte*. Arguments seeking equitable tolling of the statutory deadline should be interpreted as arguments that the Board should have applied principles of equitable tolling in reopening on its own motion. At a minimum, it was not error for the Fifth Circuit to interpret the petition in this manner.

A. When a party seeks relief through a procedure in which the relief sought is categorically unavailable, courts properly treat the request as invoking a different procedure through which the relief may be available. For example, an untimely Rule 59 motion may be treated as a request for relief under Rule 60. 12 J. Moore, Moore's Federal Practice, ¶ 59.11[4][a] (3d ed. 2012). Construal is common practice in habeas proceedings. *Porter* v. *Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (construing a 28 U.S.C. 2241 petition as seeking relief available only under 28 U.S.C. 2255); *United States* v. *Torres*, 282 F.3d 1241, 1244-1246 (10th Cir. 2002) (concluding that a district court properly construed a "writ of coram nobis and/or writ audita querela" as a successive petition under 28 U.S.C. 2255 over which it lacked jurisdiction); *Hamm*

v. *Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002) (construing a 28 U.S.C. 2254 action as brought under 28 U.S.C. 2241); *United States* v. *Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (construing an *audita querela* motion as a successive petition under 28 U.S.C. 2255). Even when a party affirmatively disclaims a particular ground, courts of appeals may construe a claim in that manner when it "appears to be the only cognizable basis" for the claim. *United States* v. *Williams*, 185 Fed. Appx. 917, 919 (11th Cir. 2006).

Habeas is not the only context in which courts recharacterize litigants' pleadings. For example, complaints against federal officials invoking 42 U.S.C. 1983 are properly treated as *Bivens* actions. *Morelock* v. *Ware*, 815 F.2d 79 (6th Cir. 1987) (unpublished). See also *Powell* v. *Fleming*, 27 Fed. Appx. 970, 974 (10th Cir. 2001) (considering construing a 28 U.S.C. 2241 petition as a *Bivens* action); *Walber* v. *HUD*, 897 F.2d 530 (6th Cir. 1990) (unpublished) (construing claims under 42 U.S.C. 1983 and *Bivens* as alleging violations of 42 U.S.C. 1981 and 1982). Complete preemption has a similar effect, treating a wholly preempted state-law cause of action as arising under federal law. *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). Substance, not form, controls.

Motions to reopen administrative proceedings governed by the APA and Hobbs Act are no exception. To the contrary, the Court has considered the basis on which the "petition that was denied sought reopening" in determining whether a court may exercise

jurisdiction. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987).

This principle is particularly applicable when the document is filed by a pro se party. *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972). Although petitioner was represented by counsel, many who challenge Board decisions are not. See Administrative Office, Judicial Business of the United States Courts 2014, Table B-9 (Sept. 30, 2014).

B. Because the statutory deadline for filing a motion to reopen cannot be equitably tolled, the statutory authority to reopen cannot provide relief after the expiration of the deadline. But it is undisputed that the Board still has the power to reopen removal proceedings, despite the untimeliness of an alien's motion, through the exercise of its *sua sponte* power.

The Fifth Circuit correctly recognized that (1) petitioner's only route to relief was through the Board's exercise of its *sua sponte* authority and (2) petitioner's challenges to the failure to provide this relief truly sounded in challenges to the Board's refusal to exercise its *sua sponte* authority.

C. Petitioner did not suffer prejudice from this interpretation of his arguments. Petitioner would be no better off if the Fifth Circuit had (as the government suggests) denied the petition on its merits. U.S. Br. 32. Even if petitioner gained nothing by the Fifth Circuit construing his petition as challenging the Board's exercise of its *sua sponte* authority, he lost nothing.

Although no meaningful standards currently permit courts to review the Board's exercise of its *sua sponte* authority, this may not always be true in the future. Current rulemaking may supply such standards. See *Matter of Compean*, 25 I. & N. Dec. 1, 2 (U.S. Atty. Gen. 2009) (directing the Executive Office for Immigration Review to initiate rulemaking procedures regarding motions to reopen and ineffective assistance of counsel "as soon as practicable").

The result in this particular case does not undermine the general rule of courts of appeals treating filings, including petitions for review, as seeking relief in a form in which it may be available. This method of construal can afford petitioners benefits in other contexts and has led the Board to employ a similar interpretation.[9]

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[9] Board decisions from the Fifth Circuit have generally followed *Ramos-Bonilla* and construed motions seeking equitable tolling as invitations for the Board to exercise its *sua sponte* authority. See, *e.g.*, *In re Armando Moreno*, No. A023555408, 2014 WL 3795516, at *2 (B.I.A. June 17, 2014) (non-precedential) ("[A]n argument for equitable tolling of the time limitation on motions to reopen is construed as a challenge to our refusal to reopen the proceedings at any time pursuant to our regulatory *sua sponte* authority."); *id.* at *3 ("[T]o the extent the respondent relies on equitable tolling principles, we are bound by the Court's holding in *Ramos-Bonilla*, *supra*, to construe the respondent's request as one for *sua sponte* reopening."); *In re Fernando Manuel Herrera De Avila*, No. A096095631, 2011 WL 7071006, at *1 (B.I.A. Dec. 27, 2011) (non-precedential) ("A request for equitable tolling in this context is in essence a request for *sua sponte* reopening.").

D. The government's reliance on *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), is unavailing. U.S. Br. 29. *Chenery* holds that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." 318 U.S. at 87. A court may not affirm the validity of an agency's order "as a determination of policy or judgment which the agency alone is authorized to make and which it has not made." *Id.* at 88.

As an initial matter, *Chenery* does not apply because the Fifth Circuit did not "judge" the Board's exercise of its *sua sponte* authority. Instead, the Fifth Circuit held that it lacked jurisdiction to judge the exercise of the Board's *sua sponte* authority (the only authority through which petitioner could have received relief). *Chenery* only "pertains to the basis that a court may use for the affirmance of *agency action that is reviewable*" and "has nothing whatever to do with *whether agency action is reviewable*." *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (emphasis in original).

In any event, there is no question that the Board treated petitioner's motion as an invitation to reopen on the Board's motion and denied "reopening as an exercise of discretion." Pet. App. 9. The Fifth Circuit did not find the Board's order valid on the basis of a judgment that the Board did not make.

There is no reason to adopt the government's strict rule that analysis must end with a denial of equitable tolling on the merits. If the deadline for

filing a statutory motion may not be equitably tolled, there is no error in construing arguments seeking equitable tolling of untimely motions as arguments that the Board should have exercised its *sua sponte* authority.

III. THE COURTS OF APPEALS HAVE NO JURISDICTION OVER THE BOARD'S FAILURE TO EXERCISE ITS *SUA SPONTE* AUTHORITY.

Having construed the petition for review as challenging the Board's decision not to reopen the proceeding on its own motion, the Fifth Circuit correctly held that it lacked jurisdiction. *Amicus* agrees with the government that "the *sua sponte* reopening regulation confers no private rights and no judicially manageable standards exist for reviewing such a decision, which is committed to agency discretion by law." U.S. Br. 35 n.13. See *Heckler* v. *Chaney*, 470 U.S. 821, 834 (1985).

Petitioner's assertion that the Board has supplied judicially manageable standards by binding itself to apply principles of equitable tolling in exercising its discretion is unavailing.[10] See Pet. Br. 26

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[10] Petitioner expressly disclaimed this argument in his petition for writ of certiorari:

> Petitioner's qualm is not with the second step of the Fifth Circuit's logic, that the Board's *sua sponte* discretion is unreviewable, but with the first step, that a request for equitable tolling is equivalent to a request

(Continued on following page)

(citing *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (noting that though an agency's discretion may be "unfettered at the outset," it may announce and follow a "general policy by which its exercise of discretion will be governed")).

Petitioner cites the Board's *Lozada* decision as the source of these standards. Pet. Br. 26 (noting *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988)). But *Lozada* does not bind the Board to reopen on its own motion. Rather, the decision establishes procedural requirements for alleging ineffective assistance. 19 I. & N. Dec. at 639 (requiring a detailed affidavit, informing former counsel, including former counsel's response, and explaining whether a disciplinary complaint was filed). A motion to reopen that fails to comply with *Lozada* will ordinarily be denied, but *Lozada* does not compel the Board to grant reopening on its own motion every time its requirements are met.

Moreover, despite *Yueh-Shaio Yang*, this Court has never held that an agency's course of adjudication transformed an unreviewable decision into a reviewable one. This Court should be hesitant to do so now because such a ruling would discourage agencies from explaining their decisions. Transforming an agency's

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for *sua sponte* power. It is only with this latter contention that Petitioner disagrees[.]

Pet. 6. In the light of this concession, the best approach may be to affirm the judgment below while reserving the issue of reviewability of the Board's *sua sponte* authority.

explanations into binding standards that courts can require the agency to follow would create an undesirable incentive for agencies not to explain their exercise of discretionary authority.

For this reason, an agency's mere reference to legal principles in explaining its refusal to exercise its discretion does not transform an unreviewable decision into a reviewable one. See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (rejecting the proposition that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable").

B. *Amicus* National Immigrant Justice Center's (NIJC) reliance on *Kucana* v. *Holder*, 558 U.S. 233 (2010), is misplaced. *Kucana* involved judicial review of "the statutory right to file a motion to reopen." *Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008). It held that the Board could not, by regulation, make this statutory right unreviewable. *Kucana*, 558 U.S. at 250 ("It is unsurprising that Congress would leave in place judicial oversight of this important procedural safeguard[.]") (internal quotation marks and alterations omitted). But there is no statutory right (nor even authority) for the Board to reopen on its own motion. This power is wholly a creature of regulatory executive grace.

NIJC is correct that an agency "may adopt rules in this context that are legal in nature," NIJC Br. 9, but the Board has not, either by rule or by adjudication, bound itself to exercise its discretion in a specific

manner. Because no standard applies to the Board reopening on its own motion, the Fifth Circuit correctly held that it lacked jurisdiction.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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